

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 240 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

SHANKARLAL MOHANLAL RAVAL

Versus

PASHIBEN WIDOW OF CHIMANLAL KUBER, SINCE D/D THROUGH HEIRS:

Appearance:

MR JITENDRA M PATEL for Petitioner

MR NK MAJMUDAR for Respondent No. 1

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 16/03/2000

ORAL JUDGEMENT

This Second Appeal has been filed against the judgment and order dated 21st November, 1979 passed by the learned District Judge, Vadodara allowing Civil Appeal No. 68 of 1978 by which the judgment and decree dated 13th September, 1977 in Regular Civil Suit No.

1146 of 1971 passed by the 3rd Joint Civil Judge (J.D.), Vadodara has been set aside.

2. The appellant-original plaintiff filed Regular Civil Suit No.1146 of 1971 for possession of the open land from the respondent-original defendant or in the alternative for possession through Court Commissioner with mesne profits and costs of the suit. According to the plaintiff, the plaintiff owns a property bearing city survey "A" division bearing Tikka No.19/2 and City survey no.1321. There is a house of the plaintiff on the said property bearing census no.1073 and the remaining land is kept open. According to the plaintiff, he is the owner and in possession of 79 sq.yds. land. The separate measurement is 8'.3" on north, 21.6" on south, 69'.1" on east and 59'.2" on west. The total area is 158 feet. On the south of his house, there is 10' x 11' (East-West and north-south) open land which was exclusively owned by him and was in his possession. The defendant's house is on the eastern side adjoining to the plaintiff's house and is also on the northern side of the open land and the defendant has no right, title or interest in the said open land and has illegally encroached upon it on 18th July, 1971 and has constructed a latrine and chokdi on the eastern side of the suit land. The defendant has also constructed a wall on the eastern side and took possession of the suit property illegally. The plaintiff also served a notice dated 10th June, 1971 to the defendant which was served on him on 15.6.71. Hence, the suit was filed.

3. The defendant resisted the suit contending that the plaintiff has no legal right to bring such suit. It is not admitted that the suit land admeasuring 11 ft was in possession of the plaintiff. In fact, his house was formerly purchased by one Natha Vanmali from Prabhu Bapu and after the death of Nathu Vanmali, it was sold by his widow Bai Kashi to Bai Khotiben. The heirs of Bai Khoti viz. Bai Icha and Chiman Kuben sold the said house to the present defendant on 16.3.45 by a registered sale deed and since then the defendant is in possession of the said house. Since the defendant is in possession of the suit land for more than 12 years, hence the suit is barred by limitation.

4. From the pleadings of the parties, the trial court framed six issues, out of which we are concerned with the following three issues.

(1) Whether the plaintiff proves that the land admeasuring 10' x 11' which is on the south of

his house bearing C.No. 1073 is of the ownership of the plaintiff ?

(2) Whether the plaintiff proves that the defendant has illegally encroached upon suit land by making construction ?

(3) Whether the defendant proves that in the alternative that she is owner of the suit land by adverse possession over 12 within the knowledge of the plaintiff ?

5. After going through the evidence on record, the trial court held that the plaintiff has proved that the land admeasuring 10 ft x 11 ft. which is on the southern side of his house bearing census no. 1073 is of the ownership of the plaintiff. The trial Court also came to the conclusion that the plaintiff has been able to prove that the defendant had illegally encroached upon the suit land by making construction. The trial court also found that the defendant has not been able to prove in the alternative that she is the owner of the suit by adverse possession over 12 years. Hence, the plaintiff's suit was decree by the trial Court.

6. Being aggrieved by the judgment and decree dated 13th September, 1977 passed in Regular Civil Suit No.1146 of 1971 by the trial Court, the respondent-original defendant filed Regular Civil Appeal No. 68 of 1978 before the District Court, Vadodara. The District Court, Vadodara framed two points for determination as under:

(1) Whether the plaintiff has subsisting title to the disputed property on the date of the suit ?

(2) What order ?

7. The lower appellate court, after going through the evidence on record, reappreciated the evidence that the plainrtiff has not said a word as to how the suit property was being enjoyed by him before, according to him, the defendant encroached it some time prior to the date of the present suit. The evidence of the natural witness was erroneously rejected by the trial court. In the light of the physical features, the suit property itself is an integral part of the defendant's property. The lower appellate court also found from the situation of the land in question that there is no door in the eastern wall of the plaintiff's house opening towards the suit property. However, eventhough, the defendant has made construction on the suit land, the plaintiff has not filed a criminal complaint against that

and though it is stat ed that some notice was served upon the defendant and illegal encroachment would amount to a criminal case, the plaintiff, under the facts and circumstances of the case was required to institute criminal proceedings, but he had not done so. The lower appellate court came to the conclusion that there is overwhelming evidence to support the defendant's case that the property purchased by the defendant under sale deed exh. 67 dated 13.3.45 is inclusive of the suit property and that the defendant is in exclusive possession and enjoyment of the suit property since then. Her possession of the suit property is, therefore, of a period more than 12 years preceding the date of the suit. In order to prove adverse possession, the party is required to prove exclusive possession and enjoyment of the property for a continuous period of more than 12 years and that possession and enjoyment must be exclusion of all others including the original owner. The suit property is encroached on all sides in exclusive control and possession of the defendant. It forms the integral part of the defendant's house and it could not be enjoyed by anybody other than the defendant. The defendant has been in exclusive possession. The possession of the defendant is open and notorious. So, by the time the defendant purchased the property, the suit property had become the property of the defendant's predecessor-in-title because of the adverse possession if not otherwise.

8. The learned counsel for the appellant has framed substantial questions of law, but, in my opinion, none of them is a substantial question of law. The findings of the lower appellate court are based purely on questions of facts on the basis of the appreciation of evidence on record. I do not find that it involves any substantial question of law for decision of this Court. Accordingly, this Second Appeal is dismissed.

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